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BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
JEFFREY W. ZWAR,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 78-233

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, an appeal from respondent Department of Ecology's denial of appellant's application for a permit to withdraw ground water for stockwatering, irrigation and domestic supply purposes, came on for formal hearing before the Pollution Control Hearings Board, Dave J. Mooney, Chairman and Chris Smith, Member, on February 26 and 27, 1979 and March 9, 1979, in Yakima and Seattle, Washington, respectively. Hearing examiner Nancy E. Curington presided.

Appellant was represented by his attorney, Kerry A. Richards. Respondent Department of Ecology (DOE) was represented by Laura E. Eckert,

1 Assistant Attorney General.

2 Witnesses were sworn and testified; exhibits were examined. Having  
3 heard the testimony, and Chairman Mooney having read the partial transcript  
4 having considered the exhibits, the Pollution Control Hearings Board  
5 makes these

6 FINDINGS OF FACT

7 I

8 Appellant owns 420 acres along McFarland Creek, near the town  
9 of Methow, in Okanogan County, where he raises livestock in  
10 conjunction with grains. When appellant purchased the land, he  
11 succeeded to certain water rights in McFarland Creek, which was found to be  
12 fully appropriated in a formal adjudication by Okanogan County Superior  
13 Court in 1922. The surface water to which appellant is entitled may not  
14 be sufficient for appellant's planned uses.

15 II

16 McFarland Creek flows for four to six miles through a mountainous  
17 region with granite-type rocks before joining the Methow River; the  
18 creek crosses three benches or terraces. Appellant's property lies  
19 on the middle bench. There are bedrock outcrops scattered throughout  
20 and flanking the McFarland Creek drainage basin. The Creek does not  
21 have a continuous surface flow but disappears underground and reappears in  
22 the form of springs throughout its course; the quantity of water depends  
23 upon the season and rainfall. The lower springs have in the past been  
24 affected by upstream diversion of water from the creek, and from irrigation  
25 of the upper bench. The creek flow is uniformly cold throughout the year.

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW  
AND ORDER

1 III

2 In July of 1977, appellant applied to the respondent  
3 for a permit to withdraw ground water from a well to be drilled on  
4 his property, for domestic, stockwater and irrigation purposes. At  
5 the time of his application, appellant intended to irrigate 42 acres  
6 with an appropriation of 420 gallons per minute; he later reduced the  
7 amount to 210 gallons per minute.

8 IV

9 In September, 1977, after his application for a permit, but prior to  
10 DOE's action on such application, appellant had a well drilled to a depth  
11 of 164 feet. The well driller first encountered water at a depth of  
12 approximately 51 feet; the next encounter of water was at 157 feet.  
13 The driller, at appellant's request, extended the well another 20  
14 feet, to 184 feet in depth, in April of 1978. Water-bearing clay,  
15 sand and gravel was reached at 175-180 feet. The static water  
16 level was found to be approximately the same after the second drilling  
17 as it had been after the first.

18 V

19 The elevation of the lower springs is approximately equal to  
20 that of the bottom of the Zwar well (1800 feet). The closest portion of  
21 the Methow River with the same elevation is approximately 34 miles  
22 upstream, four miles north of the Town of Winthrop. There are no  
23 known artesian wells in the area of the Zwar well.

24 VI

25 In June, 1978, respondent DOE participated in drawdown and recovery  
26 tests of the Zwar well. After evaluation of the test results in

1 conjunction with analysis of the area's geology, DOE concluded that  
2 the water drawn from the Zwar well was in hydraulic continuity with  
3 McFarland Creek. Since McFarland Creek is closed to further appropriation  
4 during the irrigation season pursuant to the Methow River Plan  
5 (WAC 173-548-050), DOE in its Report of Examination denied the appellant's  
6 application for a ground water permit for irrigation purposes, although  
7 the portion of the application relating to group domestic supply and  
8 stockwatering was granted.

## 9 VII

10 Appellant contends that the issue of continuity of the ground  
11 water of the well to the creek surface waters is in question, because  
12 DOE did not prove such continuity. The appellant suggests that  
13 the source of the ground water is the Methow River rather than  
14 McFarland Creek, and the water is available, the intended uses  
15 are beneficial and do not impair existing rights, and that the public  
16 interest would be served by the granting of the permit application.

17 Appellant further argues that the water right permit issuance  
18 is a ministerial act which must be carried out once the required  
19 factual determinations are made and that the issuance of a ground water  
20 permit can be directed by mandamus.

## 21 VIII

22 Any Conclusion of Law which should be deemed a Finding of Fact  
23 is hereby adopted as such.

24 From these Findings, the Pollution Control Hearings Board comes  
25 to these

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW  
AND ORDER

CONCLUSIONS OF LAW

I

Department of Ecology properly denied the appellant's application for a ground water permit for irrigation. The conclusion that the ground water withdrawn from the Zwar well is in hydraulic continuity with the surface waters of McFarland Creek is consistent with evaluation of the area's geology, in addition to the pump tests of the well itself. McFarland Creek is situated in a valley scattered with and bordered by bedrock; there are no known artesian wells in the area. The creek itself disappears underground, only to reappear as springs downstream, the consistently cold temperature of the waters and the interrelationship between the springs and the surface water flows indicates that the surface and ground waters are hydraulically connected. Furthermore, the common elevation of the lower springs and the bottom of the Zwar well strongly suggests that the water source for both is one and the same. Appellant's contention that the Zwar well taps a source related to the Methow River, as opposed to McFarland Creek, is not convincing in view of the geology of the area.

II

The finding of DOE that the ground water is in hydraulic continuity with McFarland Creek requires DOE to refer to the statutory provisions relating to surface water rights. See RCW 90.44.020, .030. The determinations which DOE must make are contained in RCW 90.03.290:

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

- 1 . . .  
2 (1) What water, if any, is available;  
3 (2) To what beneficial uses is the water to be  
4 applied;  
5 (3) Will the appropriation impair existing rights;  
6 and  
7 (4) Will the appropriation detrimentally affect  
8 the public welfare.

9 Since McFarland Creek is fully appropriated (WAC 173-548-050), it is closed  
10 to further withdrawal during irrigation season. The fact that water  
11 flows in the creek is not determinative. Since McFarland  
12 Creek is closed, any withdrawal would impair the existing rights of  
13 those whose rights were adjudicated in 1922, or of those who succeeded  
14 to such rights.

15 III

16 In an appeal of a denial of an application for a permit, appellant  
17 has the burden of showing, by a preponderance of the evidence, that DOE  
18 erred in denying such application. See e.g., Ballestrasse  
19 and Chaves v. Department of Ecology and Walczak Springs Water System,  
20 PCHB No. 78-51. The Board is not convinced that appellant has  
21 successfully carried this burden.

22 IV

23 Appellant's argument that the issuance of a ground water permit  
24 is ministerial is without merit. Although the actual,  
25 physical issuance of the permit may not involve discretion, the  
26 determinations of the conditions precedent demand evaluation of  
27 possible impact upon public welfare, existing rights, etc. See Sterpel v.  
28 Dept. of Water Resources, 82 Wn.2d 109 (1973). These considerations do not  
29 favorably compare with those involved with appellant's examples of the

30 FINAL FINDINGS OF FACT,  
31 CONCLUSIONS OF LAW AND ORDER

1 issuance of building permits.

2 V

3 Any Finding of Fact which should be deemed a Conclusion of Law  
4 is hereby adopted as such.

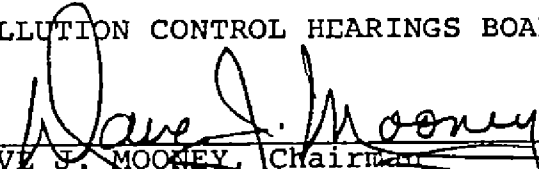
5 From these Conclusions the Board enters this


6 ORDER

7 The determination of Department of Ecology that appellant's  
8 ground water permit should issue only with the conditions set  
9 forth in its Report of Examination is hereby affirmed.

10 DATED this 5<sup>th</sup> day of June, 1979.

11 POLLUTION CONTROL HEARINGS BOARD

12   
DAVE J. MOONEY, Chairman

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15 CHRIS SMITH, Member  
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26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW  
AND ORDER